

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Application of)
)
EchoStar Communication Corporation (A Nevada)
Corporation), General Motors Corporation, and)
Hughes Electronics Corporation (Delaware)
Corporations))
)
(Transferors))
)
and)
)
EchoStar Communications Corporation (a)
Delaware Corporation))
)
(Transferee))

RECEIVED

NOV - 1 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

CS Docket No. 01-348

**PETITION BY ADVANCED COMMUNICATIONS CORPORATION
TO INTERVENE AND SEEK CONTINUANCE OF HEARING**

Petitioner, Advanced Communications Corporation ("Advanced communications"), for its Petition to Intervene and Seek Continuance of Hearing, pursuant to Sections 1.223 and 1.205 of the Federal Communications Commission's (the "Commission's") Rules and pursuant to paragraph 298 of the Commission's Hearing Designation Order in this matter released October 18, 2002, states:

1. For the reasons discussed herein, Advanced Communications is a party in interest because it claims an interest in the direct broadcast satellite ("DBS") orbital locations at 110 degrees W.L. and 148 degrees W.L. and associated channel frequencies (the "Disputed Assets") that are presently part of the proposed transaction in this matter. In addition, for the reasons

discussed herein, Advanced Communications' participation should assist the Commission in the determination of the issues in question. Pursuant to Section 1.223 of the Commission's Rules, Advanced Communications should be permitted to intervene.

I. Advanced Communications Is a Party in Interest.

2. Advanced Communications currently has pending before the Commission its Petition to Reopen Case Based on Recently Obtained, Previously Unavailable Evidence in File Nos. DBS 94-11EXT, DBS 94-15ACP, and DBS 94-16MP (the "Petition to Reopen"). A copy of the Petition to Reopen is attached hereto as Exhibit A. A decision on this Petition to Reopen had not yet been released as of October 31, 2002.

3. The Petition to Reopen concerns Advanced Communications' claim to rights in the Disputed Assets. On October 18, 1995, the Commission made a controversial 3-2 decision denying Advanced Communications' application for extension of time to construct, launch, and operate its DBS system. A copy of the Commission's October 18, 1995, Order is attached to Exhibit A as Exhibit 2 (the "1995 Order").

4. As a result of the 1995 Order, the Disputed Assets were subsequently auctioned in January of 1996. At the auction, MCI Telecommunications, Inc. ("MCI") (MCI or its parent company subsequently merged with WorldCom, Inc.), in a joint bidding effort with News Corporation Ltd. ("NewsCorp") (MCI, WorldCom, Inc., and NewsCorp are collectively "WorldCom") obtained Advanced Communication's channel frequencies and orbital location at 110 degrees W.L, for \$682.5 million, enabling WorldCom to broadcast to the entire continental United States (*i.e.*, "full-CONUS"). In addition, at the auction, a subsidiary of EchoStar Communications Corporation ("ECC") (ECC and its subsidiaries are collectively "Echostar")

obtained Advanced Communication's channel frequencies and orbital location at 148 degrees W.L., for \$52.3 million, enabling EchoStar to broadcast to the western United States.

5. By May of 1999, WorldCom had failed to launch a DBS satellite and concluded that it was "not feasible for it to proceed with the launch of a stand-alone DBS system, and . . . instead entered into a purchase agreement with EchoStar." The Commission approved the assignment of WorldCom's DBS authorization to EchoStar. See *In re Application of MCZ Telecommunications Corp.*, *Federal Communications Comm'n*, 16FCC Rcd. 21,608 (May 19, 1999). In other words, EchoStar now has authorization to use all of the Disputed Assets, including the 110 degrees W.L. full-CONUS orbital location, which EchoStar proposes in this present matter to transfer to a newly merged entity.

6. In its Petition to Reopen, Advanced Communication alleges that it has proof in the form of affidavits by former Commissioners that the 1995 Order violated the Communications Act, 47 U.S.C. § 309(j)(7)(a). The affidavits are attached to the Petition to Reopen as Exhibits 3 & 4. Section 309(j)(7)(a) mandates that the Commission "may not base a finding of public interest, convenience and necessity on the expectation of Federal revenues from the use of a system of competitive bidding."

7. Yet, two of the former Commissioners who participated in the 1995 Order state in their affidavits that the decisive vote to deny Advanced's extension was based on the expectation of substantial federal revenues that would be derived from auctioning Advanced Communications' locations and frequencies, which are the Disputed Assets. In other words, the 1995 Order violated the Communications Act and may have constituted a denial of Advanced Communications' constitutional right to an unbiased adjudicatory tribunal. See Petition to

Reopen (Exhibit A) for a more thorough discussion. Consequently, Advanced Communications contends that it has rights in and to the Disputed Assets.

II. Advanced Communications' Participation Will Assist the Commission.

8. On October 18, 2002, the Commission released a Hearing Designation Order in the instant matter designating for hearing the applications of EchoStar, General Motors Corporation ("GM"), and Hughes Electronic Corporation ("Hughes") (EchoStar, GM, and Hughes are collectively, the "Applicants").

9. Specifically, the Commission concluded that the Applicants failed to meet their burden of demonstrating that the application was in the public interest: "we are concerned that ownership of all satellites in the full-CONUS orbital locations by one entity, New EchoStar, could likely undermine our goals of increased and fair competition in the provision of DRS service." Hearing Designation Order, CS Docket No. 01-348 (released October 18, 2002), paragraph 3 (the "Hearing Designation Order"). Accordingly, one of the issues to be determined at the hearing is whether the proposed transaction causes anticompetitive harm. See Hearing Designation Order, ¶ 289.

10. If Advanced Communications is permitted to intervene, this petition serves also as a Petition for a Continuance of the hearing designated by the Hearing Designation Order until such time as Advanced Communications' Petition to Reopen is fully adjudicated, including any and all appeals if necessary, for good cause shown, as discussed below.

11. If Advanced Communications eventually obtains legal rights to the Disputed Assets, the Applicants will no longer have all of the full-CONUS DBS orbital locations, which was one of the Commission's concerns regarding the application. Advanced Communications

will have rights to the orbital location at 110degrees W.L. (full-CONUS) and at 148 degrees W.L. (western CONUS) and, as another DBS service provider, plans to be able to exert significant price discipline on the proposed merged entity.

12. In other words, Advanced Communications' participation in these proceedings should assist the Commission because the relief that Advanced Communications seeks in this petition and in the Petition to Reopen may result in the amelioration or mitigation of one of the Commission's anticompetitive concerns regarding the Applicants' proposed merger.

13. Section 1.205 of the Commission's Rules provides that continuances of any hearing may be granted by the Commission or the presiding officer for good cause shown. As discussed herein, good cause exists for continuing the hearing until final adjudication of Advanced Communication's Petition to Reopen, including any appeals if necessary, because if Advanced Communications obtains rights to the Disputed Assets, one of the Commission's anticompetitive concerns in the Hearing Designation Order will be ameliorated or mitigated.

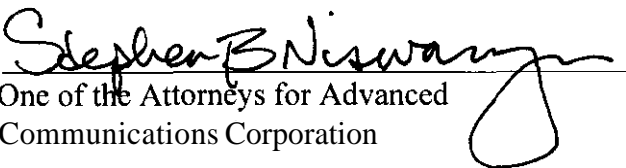
WHEREFORE, Advanced Communications requests the Commission to grant this Petition to Intervene and Seek Continuance of Hearing, pursuant to Sections 1.223 and 1.205 of the Commission's Rules and pursuant to paragraph 298 of the Commission's Hearing Designation Order in this matter released October 18, 2002, permitting Advanced Communications to intervene in this matter and continuing the designated hearing until final adjudication of Advanced Communication's Petition to Reopen, and for all other proper relief to which Advanced Communications is entitled.

Respectfully submitted,

Kathleen L. Beggs, Esq.
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, District of Columbia 20005-5901
(202) 434-5000

AND

Peter Kumpe, Esq.
Stephen Niswanger, **Esq.**
WILLIAMS & ANDERSON LLP
111 Center Street, 22nd Floor
Little Rock, Arkansas 72201
(501) 372-0800

By: 
One of the Attorneys for Advanced
Communications Corporation

Counsel to Advanced Communications Corp.

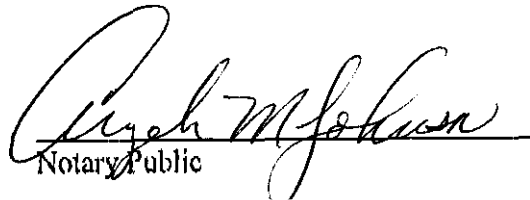
ON

I, Daniel Garner, President of Advanced Communications Corporation, state under oath that I have personal knowledge of the allegations made herein, and such allegations are true and accurate to the best of my knowledge and belief.


Daniel Garner, President
Advanced Communications Corporation

CITY OF WASHINGTON)
)SS.
DISTRICT OF COLUMBIA)

SWORN TO AND SUBSCRIBED before me, a Notary Public, this the 1st day of November
~~October~~, 2002.


Notary Public

My Commission Expires:

ANGELINE L. JOHNSON
NOTARY PUBLIC, DISTRICT OF COLUMBIA
My Commission Expires 11-15-2007

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of November, 2002, a copy of the foregoing was sent by regular mail to the following persons or entities:

Matthew M. Polka, President
American Cable Association
One Parkway Center
Suite 212
Pittsburgh, Pennsylvania 15220

*Attorneys for American Cable
Association*

Christopher C. Cinnamon
Emily A. Denney
Nicole E. Paolini
Cinnamon Mueller
307 North Michigan Avenue, Suite 1020
Chicago, Illinois 60601

Qualex International
Portals II
445 12th Street, S. W.
Room CY -B402
Washington, D.C. 20554

David K. Moskowitz
Director VisionStar Incorporated
5701 South Santa Fe
Littleton, CO 80120

Gary M. Epstein, Esq.
James H. Barker, Esq.
Arthur N. Landerholm, Esq.
Latham & Watkins
555 11th Street, N.W.
Suite 1000
Washington, DC 20004

*Counsel for General Motors Corporation
and
Hughes Electronics Corporation*

Pantelis Michalopoulos, **Esq.**
Philip L. Malet, Esq.
Rhonda M. Bolton, Esq.
Steptoe & Johnson, LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036

*Counsel for EchoStar Communications
Corporation*

Steven T. Berman
Adam D. Schwartz
National Rural Telecommunications
Cooperative
2121 Cooperative Way, Suite 500
Herndon, VA 20171

Robert J. Rini
Stephen E. Coran
Stephen M. Ryan
Manatt, Phelps, & Phillips, LLP
1501 M Street, N.W., Suite 700
Washington, DC 20005-1700

*Counsel to National Rural
Telecommunications Cooperative*

Jack Richards
Kevin G. Rupy
Keller and Heckman LLP
1001 G Street, N.W.
Suite 500 West
Washington, DC 20001

*Counsel to National Rural
Telecommunications Cooperative*

Ted S. Lodge
President & Chief Operating Officer
Pegasus Communications Corporation
225 City Line Avenue, Suite 200
Bala Cynwyd, PA 19004

Robert M. Cooper
Patrick J. Grant
Arnold & Porter
55 12th Street, N.W.
Washington, DC 20004

Counsel for Pegasus Communications Corp

Henry L. Baumann
Benjamin F. P. Ivins
National Association of Broadcasters
1771 N Street, N.W.
Washington, DC 20036

Thomas P. Olson
Nicole Telecki
Maya Alexandri
C. Colin Rushing
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, DC 20037

*Counsel to National Association of
Broadcasters*

Edward P. Henneberry
Dylan M. Carson
Pradeep Victor
Howrey Simon Arnold & White LLP
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004

*Counsel to National Association of
Broadcasters*

Peter C. Pappas
Pappas Telecasting Companies
1299 Pennsylvania Avenue, N.W.
10th Floor
Washington, DC 20004

Charles B. Slocum
Writers Guild of America, West, Inc
7000 W. 3rd Street
Los Angeles, CA 90048

Alan McCollough
W. Stephen Cannon
Circuit City Stores, Inc.
9950 Maryland Drive
Richmond, VA 23233

Robert S. Schwartz
McDermott, Will & Emery
600 13th Street, N.W.
Washington, DC 20005

Counsel to Circuit City Stores, Inc.

Gene Kimmelman
Christopher Murray
Consumers Union
1666 Connecticut Avenue, N.W.
Suite 310
Washington, DC 20009

James V. DeLong
Competitive Enterprise Institute
Senior Fellow - Project on Technology
and Innovation
1001 Connecticut Ave., N.W., Suite 1250
Washington, DC 20036

Deborah A. Lathen
Lathen Consulting
1650 Tysons, Boulevard, Suite 1150
McLean, VA 22102

Counsel for Northpoint Technology, Ltd.

Dr. Mark Cooper
Consumer Federation of America
1424 16th Street, N.W.
Suite 604
Washington, DC 20036

Cheryl Leanza
Media Access Project
1625 K Street, N.W.
Suite 1118
Washington, DC 20006

Barry D. Wood
Stewart W. Nolan, Jr.
Wood, Maines & Brown, Chartered
1827 Jefferson Place, N.W.
Washington, DC 20036

Counsel to Brunson Communications, Inc.

Jeffrey A. Eisenach
Randolph J. May
Progress and Freedom Foundation
1301 K Street, N.W., Suite 550 East
Washington, DC 20005

Barry D. Wood
Stewart W. Nolan, Jr.
Wood, Maines & Brown, Chartered
1827 Jefferson Place, N.W.
Washington, DC 20036

Counsel to Eagle III Broadcasting, LLC

John W. Katz
Office of the State of Alaska
Suite 336
444 N. Capitol Street, N.W.
Washington, DC 20001

Robert M. Halperin
Bridget E. Calhoun
Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004

Counsel to the State of Alaska

G. Nanette Thompson
Regulatory Commission of Alaska
701 W. 8th Avenue
Suite 300
Anchorage, AK 99501

Christopher C. Cinnamon
Emily A. Denney
Nicole E. Paolini
Cinnamon Mueller
307 North Michigan Avenue
Suite 1020
Chicago, Illinois 60601

Counsel for American Cable Association

Paul Greco
Public Broadcasting Service
1320 Braddock Place
Alexandria, VA 22314-1698

Tom Davidson
Phil Marchesiello
Akin, Gump, Strauss, Hauer & Feld, L.L.P.
1676 International Drive
Penthouse
McLean, VA 22102

Counsel for Vivendi Universal, S A

Marilyn Mohrman-Gillis
Lonna D. Thompson
Andrew D. Cotlar
Association of Public Television Stations
666 11th Street, N.W., Suite 1100
Washington, DC 20001

Jonathan D. Blake
Amy L. Levine
Covington & Burling
1201 Pennsylvania Ave., N.W
Washington, DC 20004-2401

*Counsel to the Association of Public
Television Stations and the Public
Broadcasting Service*

Debbie Goldman
George Kohl
Communications Workers of America
501 Third Street, N.W.
Washington, DC 20001

Mark T. Rose
United States Internet Council
1301 K Street, N.W.
Suite 350 - East Tower
Washington, DC 20005

William D. Silva
Law Offices of William D. Silva
5335 Wisconsin Avenue, N.W.
Suite 400
Washington, DC 20015-2003

Counsel to the Word Network

David A. Irwin
Irwin, Campbell & Tannenwald, P.C.
1730 Rhode Island Avenue, N.W. Suite 200
Washington, DC 20035-3101

Counsel to Satellite Receivers, Ltd.

Wallace F. Tillman
Tracy B. Steiner
National Rural Electric Cooperative
Association
4301 Wilson Blvd.
Arlington, VA 22203-1860

Marvin Rosenberg
Holland & Knight LLP
2099 Pennsylvania Avenue, N.W.
Suite 100
Washington, DC 20006-6801

Counsel for Hubbard Broadcasting, Inc.

Albert A. Foer
American Antitrust Institute
2919 Ellicott Street, N.W.
Washington, DC 20008

Matthew M. Polka
American Cable Association
One Parkway Center
Suite 212
Pittsburgh, PA 15220

Mark A. Balkin
Joseph C. Chautin, III
Hardy, Carey & Chautin LLP
110 Veterans Blvd., Suite 300
Metairie, LA 70005

*Counsel to Carolina Christian Television,
Inc. and LeSea Broadcasting Corporatio*

Jared Abbruzzese
World Satellite Network, Inc.
11044 Research Blvd.
Suite C-500
Austin, TX 78759

Scott R. Flick
Paul Cicelski
Michael W. Richards
Shaw Pittman LLP
2300 N Street, N.W.
Washington, DC 20037

Counsel to Univision Communications

David P. McClure
United States Internet Industry
Association
815 Connecticut Avenue, N.W.
Suite 620
Washington, DC 20006

Leland Swenson
President
National Farmers Union
400 North Capitol Street, Suite 790
Washington, DC 20001

Alan C. Campbell
Peter Tannenwald
Kevin M. Walsh
Irwin, Campbell & Tannenwald, P.C.
1730 Rhode Island Avenue, N.W.
Suite 200
Washington, DC 20035-3101

*Counsel to Family Stations, Inc. and
North Pacific International Television*

Arthur V. Belendiuk
Anthony M. Alessi
Smithwick & Belendiuk
5028 Wisconsin Avenue, N.W.
Suite 301
Washington, DC 20016

*Counsel to Johnson Broadcasting, Inc. and
Johnson Broadcasting of Dallas*

Mary Elizabeth Jones, ED.D
48043 Snowboard Circle
Sioux Falls, SD 57108

National Consumers League
1701 K Street, N.W.
Suite 1200
Washington, DC 20006

Andrew Z. Schwartz
Richard W. Binka
Richard M. Brunell
Foley Hoag & Eliot, LLP
1 Post Office Square
Boston, MA 02109

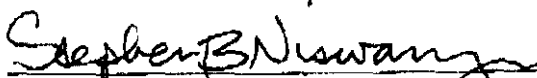

Counsel to PrimeTime24 Joint Venture

John R. Feore, Jr.
Kevin P. Latek
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036

*Counsel for Parson Communications
Corporation*

Charles W. Kelley
Chief of Investigations & Hearings Division
Enforcement Bureau
Federal Communications Commission
445 12th Street SW
Room 3-B443
Washington, D.C. 20554

*Counsel of Record for the Federal
Communications Commission*


One of the Attorneys for Advanced
Communications Corporation 

19185727/pdg-fcc-petitiontointervene.wpd

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

RECEIVED

APR - 3 2002

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of

Advanced Communications Corporation

Application for Extension of Time to Construct,
Launch, and Operate a Direct Broadcast Satellite System

File No. DBS 94-11EXT

Application ~~for~~ Consent ~~to~~ Assign Direct Broadcast
Satellite Construction Permit from Advanced
Communications Corporation to Tempo DBS, Inc.

File No. DBS 94-15ACP

Application for Modification ~~of~~ Direct Broadcast
Satellite Service Construction Permit

File No. DBS 94-16MP

**PETITION TO REOPEN CASE BASED ON RECENTLY OBTAINED,
PREVIOUSLY UNAVAILABLE EVIDENCE**

Advanced Communications Corporation ("Advanced"), for its Petition to Reopen Case Based on Recently Obtained, Previously Unavailable Evidence, states:

1. INTRODUCTION

1. Advanced petitions the Federal Communications Commission (the "FCC" or the "Commission") to reopen this case because of recently obtained, previously unavailable evidence. This evidence proves indisputably that the Commission's Order released October 18, 1995, denying Advanced's application For an extension of time to construct, launch, and operate a direct broadcast satellite ("DBS") system is illegal and void

2. The Communications Act, 47 U.S.C. § 309(j)(7)(a), mandates that the FCC "may not base a finding of public interest, convenience and necessity on the expectation of Federal

EXHIBIT A

revenues from the use of a system of competitive bidding.” Yet, two of the former Commissioners who participated in the October 18, 1995, Order have recently and voluntarily provided affidavits. These affidavits state that the decisive vote to deny Advanced’s extension was based on the expectation of substantial federal revenues that would be derived from auctioning Advanced’s locations and frequencies.

3. Although Advanced has diligently sought to pursue its remedies with respect to the October 18, 1995 Order, it has had no opportunity at any time to engage in discovery, such as depositions, or otherwise present evidence on the issues advanced in this petition.

II. FACTUAL BACKGROUND

A. Advanced as a DBS Pioneer

4. Advanced is a DBS pioneer that, during a fifteen-year period, expended or incurred millions of dollars to develop the fledgling DBS technology through the use of digital transmission and access to popular programming, and to construct a DBS system. In 1982, the FCC granted the first permits to provide DBS service and promulgated a regulation instructing the permittees to proceed with “due diligence” in constructing DBS systems. 47 C.F.R. § 100.19(b). Under this due diligence regulation, a permittee was first required to complete contracting for satellite construction within one year. Upon complying with this first requirement, the FCC would assign to the permittee orbital locations and channel frequencies. The permittee was next required under the regulation to have its satellite operational within six years of the FCC’s assignment of location and frequency, unless a proper showing was made to the FCC.

5. In 1984, the FCC granted Advanced its initial permit for 6 channels (but no orbital position) to provide DBS service. Advanced promptly contracted for the construction of

a DBS system, and in 1986, the FCC determined that Advanced met the first requirement under the due diligence regulation and should be assigned an orbital position and additional channel frequencies, although all of the requested positions and frequencies were not assigned at that time. Advanced could not broadcast at that time because it had not been assigned an orbital location and because it needed additional frequencies to compete.

6. In 1991, the FCC assigned to Advanced satellite orbital locations and additional channel frequencies that would enable Advanced to broadcast DBS service to the entire continental United States in a competitive manner. See Advanced Communications Corp., 6 FCC Rcd 2269 (1991), recon. denied, 6 FCC Rcd 6977 (1991).

7. During the time after the first permits were issued in 1982, the nascent DBS industry experienced rapid changes that made initiating DBS service more difficult than the FCC originally anticipated. Advanced nevertheless continued diligently to pursue the provision of DBS service and developed new technology enabling multiple channels to broadcast on a single DBS frequency, or transponder, thereby causing the provision of DBS service to become potentially profitable.

8. However, the rapid changes and expense associated therewith caused two-thirds of the permittees, many of whom were large and experienced media corporations, to cease efforts to provide DBS service or to merge with other permittees. No permittee was able to complete construction of a satellite within the six years required by the due diligence regulation. The FCC, therefore, did not strictly enforce the six year requirement and routinely granted extensions of time in which to commence DBS service.

9. By 1991, no DBS service had yet been initiated, so the FCC proclaimed that the pioneering days of DBS development were coming to an end and issued an order to DBS

permittees advising that the stricter enforcement of the due diligence regulation appeared to be necessary. Advanced Communications Corp., 6 FCC Rcd. 2269 (1991), recon. den'd, 6 FCC Rcd. 6977 (1991). In addition, to further expedite DBS service, the FCC announced that permittees could sell their permits or merge with another company that “is more willing and able to establish a DBS system.” United States Satellite Broadcasting Co., 3 FCC Rcd. 6858,6862 n.22 (1988). Nevertheless, the FCC continued to grant all extensions of time in which to initiate DBS service until 1995, when the FCC denied Advanced’s extension request in the decision at issue in this petition.

B. The TCI and Consulting Agreements

10. Consistent with FCC policy, in 1991, Advanced had sought and obtained an extension of time in which to launch a satellite and begin provision of its DBS service under Advanced’s first orbital location and set of frequencies. Thus, Advanced had until December of 1994 to launch a DBS satellite and commence service. During the next three years, Advanced negotiated with EchoStar to pool their resources to effectuate the initiation of DBS service. In early 1994, however, the EchoStar negotiations reached an impasse, litigation ensued, and Advanced immediately made alternative arrangements to facilitate DBS service.

11. In September of 1994, Advanced entered into an Agreement with Telecommunications, Inc. (“TCI,” which has since been acquired by AT&T) in which TCI agreed to provide satellites to Advanced, and Advanced agreed to provide its transponder capacity to TCI (the “TCI Agreement”). Under the TCI Agreement, Advanced’s permit was to be assigned to a subsidiary of TCI, TEMPO, in exchange for stock. Advanced was to retain ultimate control over all the significant operations of the DBS system under the TCI Agreement.

12. As a result of the TCI Agreement, Advanced pledged to donate two transponders on its satellites to an educational foundation, the Foundation for Educational Advancement Today (“FEAT”), which in turn agreed to provide free DBS receivers to schools and libraries across the nation. The TCI Agreement was to enable FEAT to broadcast its educational and information programming via the Your Educations Services Networks (“YES Networks”). This alliance with FEAT to provide educational broadcasting should have been a significant factor in approving the extension sought by Advanced because educational programming is a consideration that the FCC takes into account in assessing the “public interest” under the Communications Act. See Policies and Rules Concerning Children’s Television, FCC 96-335 at ¶ 154 (1991).

13. In 1994, Hughes Communications Galaxy, Inc. (“Hughes”), a subsidiary of General Motors, Inc., and USSB jointly commenced the first DBS service in the world, commonly known as DirecTV. Upon information and belief, this service has been jointly operated and offered by USSB and DirecTV, Inc. Under the TCI Agreement, TCI and Advanced were to launch their first satellite in April of 1996, making the TCI/ACC joint venture (a) the second to commence DBS service and (b) the first competitor of DirecTV.

C. The Amended Communications Act

14. Meanwhile, in 1993, the DBS regulatory and statutory landscape changed dramatically. Prior to 1993, the FCC had assigned DBS orbital locations, frequencies, and the corresponding permits through lotteries or comparative hearings, which did not generate revenues for the government. In 1993, however, the Communications Act was amended to give the FCC authority to allocate spectrum by auction. See 47 U.S.C. § 309(j). Auctions of spectrum, including DBS spectrum, has since generated at least tens of billions of dollars for the

United States government. The FCC can by law retain certain of these revenues for its salaries and expenses account, see 47 U.S.C. § 309(j)(8)(B), while the money so raised also otherwise benefits the FCC by enabling it to argue for increases in its budget.

15. Importantly, Congress recognized that permittees' rights could be jeopardized because under the amended Communications Act, the FCC would have a pecuniary interest in generating auction funds but would be adjudicating the grant or denial of licenses and permits. In deciding whether or not to grant the application for a license or an extension, the FCC must determine whether the public interest, convenience, and necessity will be served by granting such application. 47 U.S.C. § 309(a). Congress was concerned that the new auctioning process could threaten the integrity of the FCC's decisionmaking process in making such "public interest" determinations.

16. Thus, the amended Communications Act explicitly states that the FCC "may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection." 47 U.S.C. § 309(j)(7). Congress consciously adopted this prohibition in order "to insulate the FCC's communications policy decisions from budgetary pressures," recognizing that the FCC "is not a collection agency and should not be influenced by budgetary considerations" and that sound communications policy decisions should not be "sacrificed in the interest of maximizing revenues from auctions." H. Rep. No. 103-111, 93rd Cong., 1st Sess. at 258, reprinted in 1993 U.S. Code Cong'l & Admin. News 378,585.

17. This new provision of law was fully applicable when, in December of 1994, Advanced's first extension expired, and Advanced made another request to extend the time in which to commence DBS service. While MCI, USSB, DirecTV, Echostar, Dominion, and

others filed objections to Advanced's extension request, Advanced had little reason to suspect that the request would be denied because the TCI Agreement would enable Advanced and TCI to be only the second provider to commence DBS service and because the FCC had not yet denied a single DBS extension request. Indeed, two other permittees, DirecTV and Dominion, had previously been granted second extensions to retain their DBS licenses. See United States Satellite Broadcasting Co., 7 FCC Rcd 7247 (Mass Media Bur. 1992); Dominion Video Satellite, Inc., 8 FCC Rcd 6680 (1993), recon. denied, 10 FCC Rcd (1995).

18. Yet in April of 1995, the newly-formed International Bureau of the FCC denied Advanced's request for an extension of time on the ground that Advanced failed to comply with the due diligence regulation.¹ Advanced appealed the International Bureau's adverse decision to the full Commission.

D. MCI's Ex Parte Contacts and Efforts to Influence the FCC

19. MCI and other companies had not initially been interested in entering the DBS industry because the satellites could not transmit enough channels to compete with cable TV. However, with the technological advances introduced by Advanced, and the introduction and unprecedented success of DirecTV in 1994, MCI apparently changed its mind and became interested in the DBS industry. USSB and DirecTV had the best orbital location for providing DBS service to the continental United States. Advanced had the second best orbital location. MCI decided that it would obtain Advanced's spectrum.

20. Upon information and belief, MCI and EchoStar became aware in May or June of 1995, several months before the FCC's final decision, that the Commissioners were split 2-2 on

¹ The FCC has recently moved original DBS decision-making from the International Bureau to the Media Bureau. See 47 C.F.R. § 0.61; In re Establishment of the Media Bureau, FCC Docket No. 02-10 (Rel. March 14, 2002).

the issue of whether to grant Advanced's extension request. Thus, MCI and EchoStar began endeavoring to persuade the undecided Commissioner to vote against Advanced's extension request.

21. On October 10, 1995, MCI communicated ex parte with Chairman Reed Hundt regarding the denial of Advanced's extension request. Despite the fact that the FCC was obligated under the amended Communications Act to ignore expected revenues from the auction of spectrum, MCI communicated to Chairman Hundt that if the Advanced spectrum were auctioned, it would submit an opening bid of \$175 million. See Exhibit 1 (copy of MCI letter).

22. On October 16, 1995, less than one week after MCI's opening bid letter to Chairman Hundt, the FCC denied Advanced's extension request by a 3-2 margin. See In re Advanced Communications Corp., FCC No. DBS-94-11EXT, Memo. Op. and Order, para. 67 n. 127 (Adopted Oct. 16, 1995, Released Oct. 18, 1995) (the "Advanced Order"). A copy of the Advanced Order is attached hereto as Exhibit 2.

23. Commissioners Andrew Barrett and James Quello both wrote dissenting opinions, expressing their views that the FCC had changed the due diligence rules in the middle of the game and that Advanced's efforts were not distinguishable from the efforts of other permittees who had received extensions. Commissioner Quello explained that Advanced's efforts were "fully consistent with Commission precedent," and projected that the denial of Advanced's request would further delay DBS service, contrary to the FCC's stated purpose. See Advanced Order (Exhibit 2). Commissioner Andrew Barrett also dissented, stating that he was "puzzled" as to why the FCC applied "a different set of criteria for ascertaining due diligence than were used for other permittees. . . ." Id.

24. Advanced appealed the FCC's denial of its DBS extension application to the Court of Appeals for the District of Columbia. On January 24 and 25, 1996, while that appeal was pending, and before this Court had even addressed the validity of the agency's action, the FCC conducted an auction of Advanced's DBS spectrum. MCI, bidding in a joint venture with NewsCorp., Inc., obtained the spectrum with the prime orbital location for \$682.5 million. EchoStar obtained the spectrum with the less desirable orbital location for \$52.3 million. Given the timing of the auction, these parties purchased their spectrum with full knowledge of the risk that the Advanced Order might later be set aside.

25. Commissioner Quello's dissent was prophetic. By May of 1999, almost four years after MCI bid for and purchased part of Advanced's spectrum at the 1996 auction, MCI had failed to launch a DBS satellite and concluded that it was "not feasible for it to proceed with the launch of a stand-alone DBS system, and . . . instead entered into a purchase agreement with EchoStar." In re Application of MCI Telecommunications Corp., Federal Communications Comm'n, No. 99-109, 1999 WL 313932 (May 19, 1999).

E. Advanced's Unsuccessful Direct Appeal and Related Litigation

26. On May 6, 1996, this D.C. Court of Appeals ruled against Advanced on its direct appeal. While Advanced sought to raise the issue whether the FCC had violated the Communications Act, the Court declined "to search beyond the text of [the FCC's] Order to find some alleged illicit motivation on the part of the FCC." Advanced Comm. Corp. v. FCC, 84 F.3d 1452 (D.C. Cir. 1996) (unpublished opinion). The Court emphasized that it was ruling on the record before the agency, and that there was "nothing in the record that is sufficient to overcome" the presumption of agency regularity. *Id.* Thus, the Court expressed "no opinion as to whether the Commission was in fact barred by law from taking into account the expected

impact on federal revenues.” *Id.* The Supreme Court thereafter declined to grant Advanced’s petition for writ of certiorari. See Advanced Communications Corp. v. FCC, 519 U.S. 1071 (1997).

27. Thereafter, on February 20, 1998, Advanced commenced a case against MCI in the United States District Court, Eastern District of Arkansas (the “Arkansas litigation”), for intentional interference with contractual relations, seeking money damages. As part of that action, Advanced sought to develop proof, beyond the record that had been before the FCC, that the Commission had violated the law by improperly taking into account the expected revenues from the sale of Advanced’s spectrum when it denied Advanced’s extension request.

28. The district court in the Arkansas litigation, however, allowed no discovery before dismissing the action on the pleadings based on collateral estoppel, relying entirely on the D.C. Court of Appeals prior unpublished decision. On August 23, 2001, the Eighth Circuit affirmed, reading this Court’s decision as a flat ruling that “the [Communications Act] issue, raised without sufficient proof, was without merit.” See Advanced Communications Corp. v. MCI Communications, Inc., 263 F.3d 793 (8th Cir. 2001). Advanced’s petition for rehearing was denied.

29. On October 11 & 12, 2001, shortly after the Eighth Circuit Court of Appeal’s decision, former Commissioners James H. Quello and Andrew C. Barrett voluntarily provided to Advanced the affidavits attached hereto as Exhibits 3 & 4. Commissioners Quello and Barrett were the two dissenting Commissioners in the Advanced Order.

30. On October 15, 2001, based on these two affidavits, Advanced petitioned the Court of Appeals for the District of Columbia for a writ of mandamus directing the FCC to declare void the Advanced Order. On December 19, 2001, the D.C. Court of Appeals denied the

petition, declaring that the petition provided no reason for the extraordinary remedy. After considering and researching the available options, Advanced promptly filed the present petition to reopen this case.

31. At no time in the FCC proceedings, during the direct appeal before this D.C. Court of Appeals, during the Arkansas litigation, or during the mandamus proceedings before the D.C. Court of Appeals was Advanced allowed the opportunity to present or develop a factual record to prove its claims that the FCC violated the Communications Act by taking into consideration factors barred by law in its decision to deny Advanced an extension.

32. The issue did not even arise before the FCC until the Commission had already issued its decision, at which time Advanced had no meaningful opportunity to develop the record before the agency. The D.C. Court then rejected the argument on the limited basis of the record before the agency, and the Eighth Circuit ruled on the ground that the D.C. Court had already decided the issue. Thus, despite a clearly colorable basis for its claim under the Communications Act, Advanced has never been allowed to pursue that claim in any forum, nor to engage in relevant discovery on its claim.

F. New Evidence and Subsequent Developments

33. Through its own efforts and the voluntary cooperation of former Commissioners, and without the assistance of compulsory process, Advanced has obtained new, direct evidence to support its claim that the FCC violated the Communications Act in issuing that 3-2 decision.

34. Commissioners James Quello and Andrew Barrett, who have since stepped down from the Commission, have now stated under oath that based on their deliberations with the other Commissioners, at least one of the Commissioners in the majority based his or her decision in the ACC Order on the expectation of Federal revenues that would result from the reassignment